NASAHARUDIN MOHD ISA v. MOHAN PARAMASIVAM & ORS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
GUNALAN MUNIANDY JCA
AZMAN ABDULLAH JCA
[CIVIL APPEAL NO: N-02(NCvC)(W)-1300-09-2020]
15 JUNE 2023

Abstract – *A solicitor owes a duty of care to a non-party whose interests are in close proximity to the discharge of his duties to his own client. This is particularly so in transactions involving sale and purchase of properties where the solicitors concerned could be reasonably expected to foresee the loss and damage that could befall the non-client third party in the event of any breach of duty of care on his part.*

LEGAL PROFESSION: *Solicitors – Negligence – Liability – Claim against solicitors for pure economic loss – Client and non-client third party entered into consent judgment – Client failed to comply with terms in consent judgment concerning payment – Solicitors represented to non-client third party that payment would be honoured upon sale of land to individual – Sale of land to individual frustrated consent judgment and did not take place overnight – Allegations that solicitors negligent in failing to ensure that non-client third party should receive payment – Whether solicitors breached undertaking to solicitors for non-client third party – Whether solicitors negligent to non-client third party*

TORT: *Negligence – Liability – Claim against solicitors for pure economic loss – Client and non-client third party entered into consent judgment – Client failed to comply with terms in consent judgment concerning payment – Solicitors represented to non-client third party that payment would be honoured upon sale of land to individual – Sale of land to individual frustrated consent judgment and did not take place overnight – Allegations that solicitors negligent in failing to ensure that non-client third party should receive payment – Whether solicitors breached undertaking to solicitors for non-client third party – Whether solicitors negligent to non-client third party*

The appellant was the registered owner of a piece of land. The first respondent, who was represented by the second and third respondents, had filed a civil suit against the appellant at the High Court and a consent judgment was recorded between the parties. Pursuant to the terms of the consent judgment, the appellant's solicitors forwarded the memorandum of transfer in Form 14A and the original document of title of the land to the third respondent. The first respondent failed to comply with cl. 3 of the consent judgment *ie*, to make the payment of RM1 million to the appellant within nine months from the date of the consent judgment. It was then represented to the appellant that the payment under cl. 3 would be honoured

upon the sale of the land to a third party ('Phang'). The fourth to sixth respondents represented the first respondent, as the vendor, to conclude the sale to Phang. The sale of the land to Phang, which frustrated the consent judgment, did not take place overnight and, in the process, the second to sixth respondents were negligent in failing to ensure that the appellant should receive the agreed RM1 million for the transfer of the land ultimately to Phang. Aggrieved, the appellant filed a suit at the High Court against the respondents, jointly and severally, to recover a purely economic loss, namely the value of the land at RM1,447,272. A judgment in default ('JID') was obtained against the first respondent. As regards (i) the second and third respondents, the pleaded cause of action was breach of undertaking and/or negligence in their capacity as solicitors; and (ii) the fourth to sixth respondents, the appellant pleaded that they, as solicitors for the subsequent purchaser, had acted negligently in failing, refusing or omitting to ensure that the full purchase price, as per the consent judgment, was released to the appellant's solicitors. At the conclusion of the trial, the High Court Judge ('HCJ') dismissed the appellant's claim against the second to sixth respondents. Hence, the present appeal. The issues that arose for determination were: (i) whether the second and third respondents breached their undertaking to the appellant's solicitors; (ii) whether the second and third respondents were negligent to the appellant; and (iii) whether the fourth to sixth respondents acted negligently in releasing the payment by their client, the eventual purchaser, directly to the first respondent.

Held (allowing appeal)
Per Gunalan Muniandy JCA delivering the judgment of the court:

(1) The HCJ failed to give due regard to the obligation and responsibility of the second and third respondents to hold on to the issue document of title ('IDT') upon declining to accept the solicitors' undertaking requested for by the vendor's solicitors until they had procured the full purchase price from the first respondent. Deciding not to return the title to the appellant's solicitors was to be construed as impliedly accepting the undertaking. The second and third respondents were legally obliged to return the documents if they could not perform the obligations required of them. (para 28)

(2) The second and third respondents owed a duty of care to the appellant when they decided to retain the IDT although they had full knowledge that the first respondent was not prepared or able to pay the judgment sum on or before the date stipulated in the consent judgment. There was, undoubtedly, a blatant breach of duty of care on their part when they knowingly omitted or failed to return the IDT on non-payment of the consideration under the consent judgment. The arbitrary release of the IDT to the fourth respondent, without informing the first respondent or

the appellant's solicitors, had the effect of placing the appellant in a 'disadvantageously inferior' position under the consent judgment as he no longer had custody and control of the IDT. As it turned out, he was unable to uphold or preserve his rights to the land. (paras 35 & 40)

(3) The HCJ reached a wrong conclusion that, under the circumstances of this case, the fourth to sixth respondents, to whom the appellant was a non-client, did not owe a duty of care to him. The involvement of the fourth to sixth respondents led to an assumption/imposition of duty of care by them towards the appellant. Their voluntary assumption of duty of care as solicitors, in respect of the IDT, came about when they received the title from the second and third respondents before even having been appointed as the first respondent's solicitors for the sale and purchase agreement. (para 43)

(4) The appellant had satisfied the test for tortious liability for negligence to imposed on the two sets of solicitors *ie*, the second and third respondents and the fourth to sixth respondents, for pure economic loss suffered by the appellants for their breach of duty of care as solicitors in view of their proximity to the appellant. (para 49)

Case(s) referred to:

AI-Kandari v. JR Brown & Co [1988] QB 6652 ***(refd)***
Caldwell v. Sumpters (A Firm) & Anor [1972] 1 All ER 567 ***(refd)***
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
Gran Gelato Ltd v. Richcliff Ltd [1992] Ch 560 ***(refd)***
Her Majesty's Commissioners Of Customs And Excise v. Barclays Bank Plc [2006] UKHL 28 ***(foll)***
Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp (A Firm) [1978] 3 All ER 571 ***(refd)***
Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(refd)***
Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***
Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510 CA ***(refd)***
Semenda Sdn Bhd & Anor v. CD Anugerah Sdn Bhd & Anor [2010] 8 CLJ 49 CA ***(refd)***
Swamy v. Matthews [1968] 1 MLJ 138 ***(refd)***
Toh Fong Cheng & Ors v Pang Choon Kiat & Ors And Another Appeal [2020] 1 LNS 2123 CA ***(refd)***

For the appellant - Istritharan Nadarajan & Parveen Paniselvam; M/s Nor Affiza & Co
For the 1st respondent - Hafizah Johor Ariff Johor; SFC
For the 2nd & 3rd respondents - Ng Kong Peng, Nashvinder Singh Gill & Yok Jiang Lin; M/s K P Ng & Amardas
For the 4th, 5th & 6th respondents - Mark Lau & Talitha Shim; M/s Sreenevasan Young

[Editor's note: Appeal from High Court, Seremban; Civil Suit No: 22NCvC-75-10-2016 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] This appeal is against the decision of the learned judge of the High B Court ('LJ') in a suit filed by the plaintiff/appellant ('P') against six defendants/respondents ('R1-R6') jointly and severally. A judgment in default ('JID') had been obtained against the first defendant ('R1') on 10 January 2017 who, thus, was not involved in the trial at the High Court. As regards R2 and R3, the pleaded cause of action was breach of undertaking C and/or negligence in their capacity as solicitors for the purchaser ('R1'). In respect of R4 - R6, the appellant pleaded that they too as solicitors for the subsequent purchaser had acted negligently in failing, refusing or omitting to ensure that the full purchase price as per the consent judgment ('CJ') is released to P's solicitors. At the conclusion of the trial, the LJ dismissed P's D claim against both the sets of solicitors (R2 - R6). Hence, this appeal.

Background Facts

[2] The appellant was the registered owner of all that piece of land held under Geran Hakmilik No. 18104, at Lot 3022, Mukim Sepang, Daerah Kuala Langat, Selangor until 25 June 2015 ("the land"). E

[3] R1 filed a civil suit against the appellant at the Seremban High Court, to which the consent judgment ('CJ') was duly recorded by the parties on 27 January 2015. R1 was represented by R2 and R3.

[4] The terms agreed under the CJ, can be summarised as follows: F

(i) clause 1 - the appellant shall transfer the land held under Geran Hakmilik No. 18104, Lot 3022, Mukim Sepang, Daerah Kuala Langat, Negeri Selangor to R1 within seven days from 27 January 2015;

G (ii) clause 2 - the appellant shall execute all documents relevant for the transfer of the land and pass and serve the documents together with the original title of the land to the R1's solicitors, M/s Sharif & Khoo within seven days from 27 January 2015;

(iii) clause 3 - R1 shall pay RM1,000,000 to the appellant within nine H months from 27 January 2015;

(iv) clause 4 - R1 undertakes to instruct any bank or financial institution to release the sum not more than RM1,000,000 directly to the appellant in the event R1 obtains a loan by charging the property;

I (v) clause 5 - in the event R1 fails, refuses and/or omits to pay the judgment sum of RM1,000,000,00 to the appellant within the said nine months, R1 shall transfer the land to the appellant without any encumbrances, including caveat;

(vi) clause 6 - R1 shall sign and execute Borang 14A in escrow to transfer the land and serve the said Borang 14A to the appellant's solicitors within seven days from 27 January 2015;

(vii) clause 7 - If R1 fails, refuses and/or omits to pay the judgment sum of RM1,000,000 within nine months from 27 January 2015, it is declared and ordered that the land absolutely belongs to the appellant;

(viii) clause 8 - R1 shall return the original title to the land to the appellant in the event R1 fails, refuses and/or omits from paying the judgment sum of RM1,000,000 to the appellant within nine months from 27 January 2015;

(ix) clause 9 - all expenses and conveyancing fees of the land from the appellant to R1 and if necessary, in default from R1 to the appellant shall be borne by R1;

(x) clause 10 - the period of nine months must be extended with any additional days taken by the appellant to serve Borang 14A dan the original title to the land in the event the appellant takes more than seven days to serve the documents, and

(xi) Clause 11 - No order as to costs.

[5] *Vide* letter dated 2 February 2015 from Tetuan Yong Chee Kheong, Norashikin & Co acting for the appellant, M/s Yong forwarded the memorandum of transfer in Form 14A ("the MOT") and the original document of title ("the title") of the land to R3 pursuant to the terms of the CJ.

[6] R1 failed to comply with cl. 3 of the CJ to make the payment of RM1 million to the appellant within the nine months from the date of the CJ. It was then represented to the appellant that the payment under cl. 3 of the CJ would be honoured upon the sale of the land a third party, Phang Yeen Nung *vide* SPA dated 2 September 2015. R4 through R46 represented R1, as the vendor to conclude the sale to Phang.

[7] The sale of the land to Phang which frustrated the CJ did not take place overnight, and in the process R2 - R6 were negligent in failing to take steps to ensure that the appellant should receive the agreed RM1 million for the transfer of the land ultimately to a third party, Phang.

[8] Aggrieved by his losses, the appellant filed his suit on 20 October 2016 jointly and severally against the respondents to primarily recover a purely economic loss *inter alia*, pleaded and particularised as the value of the land at RM1,447,272 and other consequential orders arising from his losses.

[9] Issues for determination at the High Court:

(i) against R2 & R3

(a) whether R2 & R3 breached their undertaking to the appellant's solicitors? and

(b) whether R2 and R3 were negligent to the appellant?

(ii) against R4 to R6

(a) whether R4 to R6 had acted negligently in releasing the payment by their client, the eventual purchaser, directly to R1?

Our Decision

[10] We must first and foremost take into consideration the appellant's cause of action for negligence against the set of solicitors (R2 and R3) representing Mohan (R1). The cause of action against this set of solicitors allegedly arose due to a loss which is two-fold: first, the ownership to the land and then, second, the judgment sum of RM1 million agreed under the CJ which had been frustrated.

[11] It was alleged that the sale of the subject land to the third party ('Phang'), who was the subsequent purchaser did not take place overnight but after passage of some time during which the negligence of the two sets of solicitors lay in failing to ensure that the purchase price of RM1 million reached the appellant as mandated by the CJ upon the land having been transferred to R1.

[12] Of utmost importance to the determination of this dispute is the nature of the CJ dated 27 January 2015 which is central to the resolution of the issues in dispute. It is well settled that in law a CJ is a binding contract between the parties to the CJ, who in this instance, are the appellant and R1. It is the appellant's position that the said contract was superadded by the Seremban High Court order. As to the effect of the CJ together with the superadded order, the appellant's contention was summarised as follows:

(i) the appellant and Mohan ('P & R1') are the primary contracting parties to resolve their dispute by performance of the 11 terms agreed in the CJ;

(ii) they are represented by their choice of solicitors;

(iii) R2, R3 & R4 and the firm ('R6'), being Mohan's solicitors as per cl. 2 of the CJ owe a duty to the court as officers of the court, alongside their duties to Mohan;

(vi) on top of the above, the said solicitors owe a duty to the appellant in their professional capacity, which is the main point the appellant will impel this court to consider in the determination of his appeal; and

(v) these parties' legal obligations are confined within the four corners of the CJ, which is essentially a contract in law.

[13] It bears reiteration that in the High Court, the basis of the appellant's claim against R2 was two-fold: firstly in contract for breach of an undertaking to return the IDT in default of Mohan's compliance with the CJ as per M/s Yong's letter dated 2 February 2015, and secondly, for negligence for failing to return the IDT after 27 October 2015, which was after the nine month period for R1 to comply with the CJ.

[14] The undertaking sought by M/s Yong & Co from R2, R3 and their client in consideration of delivering to R2 and R3 the vital documents from the appellant to effect the transfer of the subject land to Mohan ('R1') was explicit and abundantly clear.

[15] The appellant submitted that the LJ had misdirected himself and fallen into error on this point for dismissing the claim for these reasons:

(i) M/s Yong & Co could not impose an undertaking on R2 and M/s Sharif & Khoo to return the IDT if Mohan was unable to pay the RM1 million within nine months from the date of the CJ;

(ii) alternatively, even if there could be an imposition of undertaking by M/s Yong & Co, R2 and M/s Sharif & Khoo ('R3') did not accept the terms of the undertaking by virtue of D9, where the appellant did not prove such an acceptance of undertaking by R2 and R3;

(iii) R2 and R3 did not owe a duty of care towards the appellant since they were not representing him, by virtue of the High Court's *obiter* in *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; [2002] 6 MLJ 507; and

(iv) the appellant failed to prove negligence against both R2 and R3.

[16] On the purported undertaking imposed on R2 and R3, they contended that such an undertaking could not in law be imposed on them as it was against and not based on the terms of the CJ. Alternatively, even if it can be imposed on R2 and R3, they did not agree to or give such an undertaking. It was submitted that due to the nature and terms of the CJ, the purported undertaking cannot stand for these reasons:

(i) the CJ is evidence of a contract/agreement between D1 and the plaintiff;

(ii) only D1 and the plaintiff being parties to the CJ are bound by the terms of the CJ;

(iii) D2 and D3 as solicitors of D1 are not parties to the CJ and thus, not bound by the terms of the same;

(iv) there is no obligation imposed upon D2 and D3 in the CJ to return the title to M/s Yong if D1 defaults in his payment of the judgment sum. Such an obligation is on D1 pursuant to cls. 2 and 8 of the CJ; and

(v) M/s Yong's attempt to impose such an obligation on D2 and D3 by way of an undertaking is a unilateral attempt to vary the terms of the CJ without the consent of D1. Such an attempt is misconceived, not permitted in law and ought to be rejected.

[17] R2 ('D2') testified in court that when R3 received the letter from M/s Yong & Co dated 2 February 2015 – *via* fax, D3 immediately issued a reply dated the same day *via* ordinary post and faxed it to M/s Yong & Co refusing to give any such undertaking and stating that the title was received pursuant to the terms of the CJ.

[18] R2 said that when R3 received the hard copy of the same letter by hand, he proceeded to call the solicitor in charge in M/s Yong & Co, one Norashikin (SP2) and confirmed that the land title ('IDT') had been released pursuant to the terms of the CJ and to facilitate R1's contractual obligations as per the CJ. Thereafter, D3 allegedly sent a letter on the same day to M/s Yong & Co to confirm the conversation. SP2 denied having sent any fax letter dated 2 February 2015 and also denied receipt of R3's letter dated 2 February 2015 by post. R2 and R3 contended that the said denial was inconsistent with contemporary documents and not pleaded in the appellant's reply to the defence.

[19] On the first ground of appeal pertaining to the imposition of an undertaking on R2 and R3 by M/s Yong & Co for the return of the IDT, the appellant's position was that the issue should be answered in the affirmative because M/s Yong & Co owed a duty of care towards him in its professional capacity as his solicitors, to ensure that the transmission of the original IDT of his land was accounted for. It would have been gravely negligent of M/s Yong & Co to convey the original IDT to an opposing party, without any expectation of the return of the same in the interest of the appellant as the owner of the land as of 2 February 2015. The appellant's argument on this crucial point was that if R2 disagreed with the undertaking requested, they ('R2 and R3') should have returned the original IDT and not have released it to R1 or any other party.

[20] The appellant also referred to the common conveyancing practice among solicitors specialising in conveyancing to procure or impose such an undertaking to protect the property owner's interests. It is indisputable that a solicitor having custody of a landowner's title has an onerous duty to protect his client's interest considering that the original title is an invaluable document.

[21] Although R2 strongly denied the giving of such an undertaking expressly or impliedly, the appellant urged us to be persuaded by the Court of Appeal's observation in *Semenda Sdn Bhd & Anor v. CD Anugerah Sdn Bhd & Anor* [2010] 8 CLJ 49; [2010] 4 MLJ 157 is persuasive of the appellant's stance as Sulong Matjeraie JCA observed the following that:

> [38] The probity, decency and credibility of the solicitors who failed to honour their letter of undertaking will be at stake. Letters of undertaking are widely used in the legal practice particularly in firms which handled substantial conveyancing work. In practice letters of undertaking are used in a number of transactions ranging from the release of funds to customers by banking and financial institutions before documents of unencumbered document of titles are properly registered with the appropriate land registries. Another situation where a letter of undertaking is being used is where documents of titles are released before full payment of the purchase price had not been made as in this instant case. Solicitors making the undertaking should not renege on their undertaking as this is the very basis for their own honoured existence as conveyancing lawyers. This is a solemn and sacred duty of solicitors. Issuance of a letter of undertaking from one firm to another marks the epitome of conveyancing practice in any Torrens jurisdiction.

[22] Reference was also made to the Malaysian Bar Council Rules and Rulings in relation to which the appellant submitted that the requirement to return any documents in possession of a solicitor if an undertaking could not be given is codified as a rule of professional obligations and ethics as per r. 14.09(1).

[23] Flowing from the above submission, the point to note is that M/s Yong & Co had sent to R3 a document of value ('IDT') subject to an undertaking as requested and going by R2's response, the undertaking or conditions as proposed were not acceptable to R2 and R3. Despite that, no attempt was made by R2 to return the IDT to M/s Yong & Co.

[24] As the appellant and the respondent took diametrically opposing positions on whether M/s Yong & Co could in law unilaterally impose a solicitor's undertaking on R2 and R3, our emphasis will not be on this point but on grounds 2 and 4 of the appeal pertaining to whether R2 and R3 had a legal responsibility to return the original IDT to the appellant's solicitors in view of their refusing to accept the proposed undertaking which was patently crucial to the appellant's interest in the property. In the appellant's view, this question should be answered in the affirmative and the error of the LJ was said to be in finding that even if M/s Yong & Co could impose an undertaking on R2 and R3, they could refuse the undertaking as was done *vide* their letter dated 2 February 2015 (exh. D9) the admission which was strongly challenged by the appellant at the trial. The LJ found the challenge to be an afterthought whereas the appellant contended that the LJ's evaluation of D9 was a flaw.

[25] Four reasons were advanced by the appellant to support the above contention:

(i) the letter dated 2 February 2015 signed by R2 was never received by R3 because it was only sighted for the first time after approximately 11 months as an enclosure to R3's letter dated 11 January 2016. It is

peculiar and extremely unconventional for a solicitor to enclose a letter alleged to have been previously sent, in a subsequent letter. Logically, the normal practice for solicitors is to make reference to a letter previously sent but unusual and suspicious to enclose a letter claimed to have been previously sent;

(ii) it was incredible for R2 and R3 to plead in their defence that their letter dated 2 February 2015 was issued to M/s Yong & Co on the same date *via* fax and ordinary post, when there was uncontroverted documentary evidence that the former had only received M/s Yong & Co's letter dated 2 February 2015 which was only sent by hand, on 4 February 2015. Neither was there evidence of M/s Yong & Co's letter dated 2 February 2015 having been faxed to R3 on 2 February 2015 or any other date;

(iii) as early as 2 March 2016, M/s Yong & Co had denied receipt of the impugned letter, and yet R2 and R3 had not adduced any documentary evidence to contradict the appellant's stance on this fact in issue by proving that their 2 February 2015 letter had been sent *via* fax and ordinary post to M/s Yong & Co. Hence, the onus of proof did not shift to the appellant.

(iv) the alleged teleconversation said to have transpired between R2 and Puan Norashikin of M/s Yong & Co could not be true as it was not supported by any concrete proof of the issuance of R3's letter to M/s Yong & Co by fax and post.

[26] Importantly, the authenticity of D9 was rightly challenged as it was merely a file copy as admitted by R2 and not his original undersigned letter which was allegedly sent to M/s Yong & Co on 2 February 2015. Our view is that on this ground alone, D9 should not have been admitted into evidence in support of the defence of R2 and R3.

[27] Two crucial facts arise from the circumstances surrounding the release of the original IDT by M/s Yong & Co to R3 on which we join issue with the appellant as follows:

(i) first, assuming that the impugned letter was received by M/s Yong on 2 February 2015, as R2 took a position that they accepted no undertaking to return the transfer documents, they rightly ought to have returned the transfer documents immediately, because that is what was required of them in M/s Yong's letter;

(ii) second, assuming that the impugned letter was received by M/s Yong on 2 February 2015, R2 and R3 were still duty bound to return the original IDT, the latest on 28 October 2015, being the next day after the nine-month period for Mohan to satisfy the RM1 million in favour of the plaintiff/appellant.

[28] Notably and importantly, R2 and R3 may not have been in any position to return the IDT to the appellant after 10 February 2015 as they had, in our view, without authority from Ms Yong & Co discreetly released to R4 and R46 the IDT which the former was not aware of. To our minds, the LJ had failed to give sufficient judicial appreciation to the factual matrix in failing to give due regard to the obligation and responsibility of R2 and R3 to hold on to the IDT upon declining to accept the solicitor's undertaking requested for by the vendor's solicitors until they had procured the full purchase price from R1. Deciding not to return the title to M/s Yong & Co is to be construed as impliedly accepting the undertaking which the LJ failed to appreciate. It is vital for us to note the terms on which R2 and R3 received and accepted the essential transfer documents from the vendor's solicitors. R2 and R3 were legally obliged to return the documents if they could not perform the obligations required of them which was what exactly occurred in this instance. (See *Semenda Sdn Bhd & Anor v. CD Anugerah Sdn Bhd & Anor* [2010] 8 CLJ 49; [2010] 4 MLJ 157).

[29] We now proceed to deliberate on the determinative issue in this appeal, which is whether R2 and R3 owed a duty of care to the appellant as the solicitor for the purchaser from the receipt and retention (as represented) of the IDT? first and foremost, R2 and R3 were fully aware of the terms of the CJ between R1 and the appellant.

[30] We note that R2 and R3 are solicitors within the meaning of the Legal Profession Act 1976. Our attention was drawn to *Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp (A Firm)* [1978] 3 All ER 571 at 582, where Oliver J stated as follows:

> The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received ... The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession ...

Also see, *Swamy v. Matthews* [1968] 1 MLJ 138.

[31] We are convinced that under certain circumstances, the exceptions to the third party or privity rule would apply, wherein a duty of care could be imposed on a solicitor to a non-client. (See *AI-Kandari v. JR Brown & Co* [1988] QB 6652 and *Gran Gelato Ltd v. Richcliff Ltd* [1992] Ch 560.

[32] In our view, the LJ had erred in not correctly applying the settled principle as to the duty of care owed by a solicitor to a non-party whose interests are in close proximity to the discharge of his duties to his own client. This is particularly so in transactions involving sale and purchase of

properties where the solicitors concerned could be reasonably expected to foresee the loss and damage that could befall the third party non-client in the event of any breach of duty of care on his part.

[33] We respectfully concur with the recent Court of Appeal judgment in *Toh Fong Cheng & Ors v. Pang Choon Kiat & Ors And Another Appeal* [2020] 1 LNS 2123; [2020] MLJU 1476, where this court through Lee Swee Seng

> [112] … Lest it be argued that a solicitor does not owe any duty whatsoever to a person not his client, the following passage from *Jackson and Powell on Professional Liability*, 8th edition, Sweet & Maxwell has traced the development of the law here with respect to extending a duty of care to being owed to a third party who may not necessarily be the solicitor's client as follows:
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> [113] The learned editors of *Charlesworth & Percy on Negligence*, 14th edition, 2018, Sweet & Maxwell, sketched the development of the law with respect to a solicitor's duty to a third party as follows:
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> > 10-235
> >
> > Duty to third party in tort Prior to 1963, except in cases where a solicitor was liable as an officer of the court, it was generally considered that no duty of care was owed to a person who was not a client. Although not recognised at the time, the first erosion of this principle had actually taken place with the decision in Donoghue v Stevenson. Then, in 1963, with *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*, a wider principle emerged. A solicitor who, upon request, gave advice or information negligently, whether gratuitously or not, to a non-client, and had reason to believe that the advice or information would be acted upon, could well be liable, in the absence of clear disclaimer, for loss or damage suffered in consequence.
> >
> > *Nowadays … it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm*. It is certain that a banker or accountant is under such a duty. *And I see no reason why a solicitor is not likewise*. The essence of this proposition. however, is the reliance … The professional man must know that the other is relying on his skill and the other must in fact rely on it.
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> …
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> [121] Sir Robert Megarry VC at the Chancery Court rejected this argument and *held that a solicitor can be liable to a third party in tort*. The court found that there was a sufficient degree of proximity between a solicitor and the identified third party for whose benefit the solicitor was instructed to carry out a transaction for it to be within the solicitor's reasonable contemplation that his acts or omissions in carrying out the instructions would be likely to injure the third party. Megarry VC said at p 591 as follows:

> ... once it is held that the solicitor owes a duty of care to the beneficiaries. the loss to them is directly caused by the solicitor's breach of that duty and reliance by the plaintiff is irrelevant. If the duty of care is imposed on what I may call pure *Donoghue v. Stevenson* principles. and the loss occurs without being dependent on any reliance by the plaintiff. then I cannot see how the presence or absence of reliance by the plaintiff can affect liability ...
>
> (emphasis added)

[34] We are equally convinced that the three-fold test in *Caparo Industries Pic v. Dickman* [1990] 2 AC 605 was also fulfilled in this instance where there was an obvious foreseeability on the part of R2 and R3 to foresee the damages the appellant would suffer if the terms of the CJ are not complied with in letter and spirit. Public policy considerations also come into operation in this case where an enforceable CJ has to be given force and recognition by solicitors handling a transaction from which a duty of care arises even to non-clients where the foreseeability test is satisfied under the circumstances. It would be owed to affected parties likely to suffer damage regardless of any solicitor-client relationship.

[35] To sum up on the issue at hand, we would conclude without hesitation that, contrary to the view of the LJ, that R2 and R3 owed a duty of care to the appellant when they decided to retain the IDT although they had full knowledge that R1 was not prepared or able to pay the judgement sum on or before 27 October 2015 as expressly stipulated in the CJ. It was erroneous for the LJ to hold that they did not under the present circumstances owe a duty of care to the appellant which was patently contrary to the established principles of the law of negligence as enunciated by a long line of leading authorities such as the classic 'neighbour principle'. There was undoubtedly, a blatant breach of duty of care on their part when they knowingly omitted or failed to return the IDT on non-payment of the consideration under the CJ when fairness and logic obviously called for it.

[36] Likewise, we would also hold that the LJ had failed to judicially appreciate the evidence as a whole when he wrongly found that R2 and R3 had not, by their acts or omissions, caused losses to the appellant. On the contrary, the breach of duty of care by R2 and R3, specifically in their failure to return the IDT to M/s Yong & Co when it was incumbent upon them to do so when the payment period had lapsed, ultimately resulted in the appellant losing both his land and the RM1 million due to him from R1.

[37] From the following facts, it is evident that the appellant's loss was directly attributable to R2 and R3's breach of their duty of care:

(i) R2 and R3's continued retention of the IDT even after they had disagreed to hold it on an undertaking, contrary to r. 14.09(1) of the Malaysian Bar Council Rules and Rulings; and

(ii) regardless of the admissibility of D9, which the appellant challenged, R2 and R3 had unilaterally and arbitrarily released the IDT to R4 on 10 February 2015 without the knowledge of M/s Yong & Co who had no knowledge of R4's involvement in the disposal of the subject property to a third party.

[38] There was manifestly insufficient judicial appreciation of the evidence by the LJ for failure to critically examine the conduct of R2 and R3 in retaining the IDT and then, wrongfully releasing to R4, thereby inducing M/s Yong & Co to believe that R1 would comply with the terms of the CJ by paying RM1 million to the appellant. In failing to find negligence against R2 and R3, the LJ, in our view had acted against the weight of evidence, particularly for failing to appreciate that R2 and R3 had blatantly neglected to inform M/s Yong & Co that the IDT entrusted to them had been released to R4.

[39] Our attention was brought to the observation of Salmon LJ in *Caldwell v. Sumpters (A Firm) & Anor* [1972] 1 All ER 567 which is of assistance where:

> The crucial factor in this case is that Sumpters, because of their lien, had the legal right to possession of the documents. *The documents were being offered on the terms of the letter of 15 January. The law does not in my view allow retention of the documents and repudiation of the terms on which they are offered. This seems to me to be clear on principle. There is little authority on the point, possibly because it is so plain. What authority there is tends to support the view I have formed. There is certainly no authority the other way*. (emphasis added)

[40] We are convinced that there was overwhelming evidence of breach of duty of care by R2 and R3 as the arbitrary release of the IDT to R4 without informing R1 or M/s Yong & Co had the effect of placing the appellant in a 'disadvantageously inferior' position under the CJ as he no longer had custody and control of the IDT. As it turned out, he was unable to uphold or preserve his rights to the land.

[41] To sum of on the case against R2 and R3, our judgment is that the LJ had erred in failing to sufficiently judicially appreciate the evidence in dismissing the claim against R2 and R3 which was a decision that was plainly wrong on the facts and in law when R2 and R3's breach of the undertaking sought by M/s Yong & Co as alluded to and more importantly, their breach of duty of care owed to the appellant that arose from the present circumstances had undoubtedly been established.

[42] We now turn to the case against R4 - R6. We must first bear in mind the reasons for the LJ's dismissal of the appellant's claim for negligence against R4 - R46 which were briefly as follows:

(i) R4, R5 and M/s LRA ('R6') did not owe a duty of care towards the appellant since they were not representing him;

(ii) the plaintiff/appellant failed to prove that they were negligent towards him by calling any witnesses to prove such a duty and a subsequent breach of it;

(iii) M/s LRA was obliged to release the balance purchase price to only Mohan ('R1') pursuant to the SPA;

(iv) the plaintiff failed to prove that R4, R5 and R46 gave a representation to ensure that the judgment sum will be paid to him; and

(v) M/s LRA's letter dated 17 November 2015 did not state that they would pay the judgment sum in consideration of the plaintiff's removal of caveat;

(vi) Norashikin, a partner of M/s Yong & Co did not obtain a fresh undertaking from M/s LRA to release the judgment sum before the plaintiff removed his caveat.

[43] We are in agreement with the appellant's contention that the LJ had reached a wrong conclusion that under the circumstances of this case, R4 - R6 to whom the appellant was a non-client did not owe a duty of care to him. Our considered opinion, from a scrutiny of the undisputed facts is that from the factual matrix pertaining to the involvement of R4 - R6 in the disposal of the appellant's property to a third party leads to an assumption/imposition of a duty of care by them towards the appellant. Their voluntary assumption of duty of care as solicitors in respect of the IDT came about when they received the title from R2 and R3 before even having been appointed as Rl's SPA solicitors.

[44] A crucial fact that has a significant bearing to the issue at hand is that, R4 had knowledge of the draft CJ at that point in time and the CJ itself was served on him on 31 March 2015. We agree with the appellant that while R4's evidence that he did not pay attention to both the draft CJ and the CJ indicates negligence on his part, he could not in any event be relieved of his responsibility and professional standard of care as a solicitor to ensure that the sale of the property to a third party was carried out in compliance with the letter and spirit of the CJ. In essence, the requirement for R1 to satisfy the judgment sum as mandated in the CJ could not be wantonly disregarded. As the evidence was indisputable that R4 - R6 were aware of the terms of the CJ, particularly as to the appellant's right to the judgment sum by the date stipulated, to our minds, R4 - R6 could not be absolved of liability for breach of their duty of care as solicitors, *albeit* to a non-client for parting with the land title and arbitrarily releasing the proceeds of the sale to R1 and not even to Rl's solicitors who entrusted the title to them. Their act was in blatant disregard of and plainly inconsistent with the terms of the CJ which they appeared to have brushed aside.

[45] The thrust of R4 - R6's opposition to this appeal was that the LJ had rightly concluded the R6 did not owe a duty of care to the appellant on the basis that he was a non-client. Reliance was placed on the Federal Court judgment in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 where it was said to have been held conclusively that solicitors do not owe a duty of care to non-clients/third parties except in very limited circumstances and based on the pleaded case, this is not a disappointed beneficiaries' case. It is not pleaded nor proved there was any reliance, and therefore, there is no assumption of responsibility.

[46] We have duly noted R4 - R6's summary of the points that negatived any duty of care on their part as follows:

(i) the appellant admitted he was represented by his own solicitors, Messrs Yong & Co, to safeguard and protect his interests in the implementation of the consent judgment and that he fully relied on Messrs Yong & Co for advice;

(ii) on the contrary, Lim Ram & Associates' ('R6') duty is to act for and safeguard the interest of their client, namely Mohan ('R1'), in respect of the SPA; and nothing more. At best, R6's duties and responsibilities are limited to its stakeholder obligations under the SPA, that is, to release the monies to R1 only, which is inconsistent with any representation, impression, a duty of care or voluntary assumption of responsibility by R6 to pay the judgment sum to the appellant/Messrs Yong & Co;

(iii) R6 is not a party to, nor bound by, and did not have any obligations under the CJ. So, there cannot be any reliance or sufficient proximity to a duty of care. Even if there was any reliance (which is not pleaded), it is unreasonable in the context of this case;

(iv) even if there was sufficient proximity (which we do not accept), we must be mindful of policy considerations that militate against the finding of a duty of care.

(a) a duty of care should not be imposed on solicitors towards non-clients, like the appellant, in a commercial transaction whose interest is in conflict with that of R6's client.

(b) imposing a duty of care on R6 in these circumstances would effectively make the law firm an underwriter of the financial consequences of any transaction.

[47] With respect, we are not inclined to agree with the above position taken by R4 - R6. As we have emphasized earlier, predicated on the factual matrix pertaining to R6 taking custody of the appellant's land title without the knowledge of M/s Yong & Co and the judgment sum not having been

paid to the appellant pursuant to the explicit terms of the CJ, there was a clear assumption of duty of care by R4 - R6 towards the appellant. We have already commented on the breach of that solemn duty by R4 - R6 in acting negligently.

[48] We must reiterate that certain key aspects of the factual matrix point unmistakably to a duty of care having arisen on the part of R4 - R6 to the proprietor of the land, *ie*, the appellant, amongst, others, as early as 10 February 2015 or 3 February 2015, R4 and R6 had knowledge of the underlying facts giving rise to their appointment and by accepting the IDT from R2 and R3 without an appointment by R1, they assumed a duty of care towards the appellant in their professional capacity. By their letter dated 12 November 2015 to M/s Yong & Co, they sought removal of the caveat entered by the appellant. Thirdly, R4 represented to M/s Yong & Co that RM1 million will be released to the appellant with three days from the sale on 2 September 2015. Lastly, R4 also confirmed to R2 and R3 *vide* letter dated 3 November 2015 that the balance proceeds of the sale were being held by R6.

[49] Under the circumstances, we would hold that, contrary to the finding of the LJ, the appellant had satisfied the test for tortious liability for negligence to be imposed on the two sets of solicitors ('R2 - R3' and R4 - R6) for pure economic loss suffered by the appellants for their breach of duty of care as solicitors in view of their proximity to the appellant. (In *Her Majesty's Commissioners Of Customs And Excise v. Barclays Bank Plc* [2006] UKHL 28 followed).

[50] In our opinion, on the factual matrix and circumstances of this case, it is reasonable to impose a duty and a liability for negligence on R4 upon M/s LRA's assumption of duties as to the possession of the IDT as early as 10 February 2015 which ultimately enabled R1 to dispose of the land to a third party in absolute defiance from compliance with the CJ.

[51] Before concluding that a duty of care could reasonably be imposed on R2 - R6 as solicitors to non-clients and that, on the facts and the weight of evidence, they should be held liable for negligence against the appellant, we place on record that we adopt the principle enunciated in *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510; [2016] 3 MLJ 660 as follows:

> [86] The general rule is that a solicitor owes a duty of care primarily to his client but like all general rules, there are exceptions. *Ross v. Caunters (a firm)* [1979] 3 All ER 580 is authority for the proposition that the duty of care of a solicitor is not limited to his client while *Penn v. Bristol & West Building Society And Others* [1997] 3 All ER 470 demonstrates that although a solicitor believes he is acting for someone as his client, if it is found that he was not so acting or authorised so to act, and his negligence leads to damage and loss to that someone, he is liable to that person.

A ...

[88] We consider these authorities to be good law on liability in negligence by advocates and solicitors to third parties in circumstances peculiar to the facts and circumstances of the present case. With due respect to the learned JC, he was wrong in holding that he was bound
B by the *dictum* in Yap Ham Seow. We agree with learned counsel for the plaintiff that the case is not authority for the blanket proposition that a solicitor never owes a duty of care to a third party. Whether a solicitor is to be held liable to a third party must depend on the facts and circumstances of each case.

C **Conclusion**

[52] Premised on the foregoing grounds as elaborated, the decision that we pronounced in this appeal supported by broad grounds was as follows:

The transfer of the land from appellant/plaintiff ('P') to the first defendant ('D1') pursuant to a consent order was where D1 was given nine months
D to pay the agreed purchase price. The details as to how this is to be done so that the terms of consent order may be implemented and enforced would be left to the solicitors of the parties handling the mechanics of the transfer of land for at agreed purchase price.

It was reasonable for the P's solicitors M/s Yong & Co to write to D1's
E solicitors M/s Yong Sharif & Khoo to put them to their undertaking as solicitors as well as to Dl's undertaking when delivering the title (IDT) to M/s Sharif & Khoo that the IDT was so delivered against their undertaking to pay the balance purchase price within the nine months period.

The evidence of Sharif & Khoo's solicitor Mr Gurdit Singh (DW-2) was
F that he could not give the said undertaking. If that be so, Mr Gurdit must put in writing to M/s Yong & Co and receive an acknowledgment from M/s Yong & Co that they cannot so give the undertaking but yet would be dealing with the IDT.

However, we are more inclined to believe the solicitor from M/s Yong &
G Co that no such letter was received, for otherwise they would have objected and asked for the title back.

The so-called letter from M/s Sharif & Khoo stating their inability to give the undertaking is seriously doubted as for something so important, there must be some evidence of it being received by M/s Yong & Co.

H Moreover, there is a Bar Council Ruling that in the event that the terms of an undertaking sought to be imposed on a solicitor cannot be given, then the said solicitor must return the documents, in this case the Memorandum of Transfer ('MOT') and the IDT to the vendor's solicitors, intact.

I

In the circumstances of the case, M/s Sharif & Khoo would have known that without their solicitors' undertaking given to M/s Yong & Co, there is nothing to ensure that the balance purchase price would be payable to M/s Yong & Co when the title is eventually transferred to D1 or to D1's subsequent purchaser.

In this case the title was released by M/s Sharif & Khoo who knew for a fact that Nasaharudin ('appellant') was at the mercy of D1 to decide whether and when he would want to pay Nasaharudin for the title is already with M/s Sharif & Khoo who had no qualms in releasing it to M/s Lim Ram ('R6') acting for the purchaser of the land from D1.

A prudent solicitor in the circumstances of the case would ensure that the balance purchase price is deposited with M/s Sharif & Khoo before parting with the title to another firm of solicitors, in this case, M/s Lim Ram who were acting for the purchaser of the land from D1.

Not having done so, the said Sharif & Khoo had in turn breached their duty of care by parting with the title to M/s Lim Ram without receiving the purchase price. Whilst M/s Sharif & Khoo did write to M/s Lim Ram to remind them that they are to ensure the balance purchase price is paid to M/s Sharif & Khoo, they did not exact any undertaking from M/s Lim Ram.

M/s Lim Ram in the circumstances of the case was aware of the Consent Order under which the Vendor Nasaharudin was entitled to the balance purchase price. Therefore, M/s Lim Ram cannot feign ignorance from the evidence to simply part with the balance purchase price to D1 instead of paying to Nasaharudin or his solicitors M/s Yong & Co.

Whilst generally a solicitor would only owe a duty of care to his client, there are exceptions and in cases where he knows that a third party is relying on his skill and representation with respect to payment of purchase price, he cannot act in total disregard of the interest of the third party and release the purchase price to a party that he knows or ought to have known, was not a genuine party to receive the balance purchase price in this case.

This loss would not have happened and was fully foreseeable by any solicitor exercising ordinary care and skill expected of him in a straight forward conveyancing transaction.

In the circumstances of the case we do not think that both sets of solicitors in M/s Sharif & Khoo as well as in M/s Lim Ram can be absolved of liability by denying a duty of care owed to the vendor who has not been paid in total disregard of the terms of the consent judgment which would have put them on notice that they need to verify that the vendor Nasaharudin had been so paid before releasing the balance purchase price or before parting with the title and registering it in D1's name as the case maybe.

We have also noted that D4 under cross-examination admitted that M/s Yong & Co had reminded him to ensure payment is received by M/s Yong & Co on behalf of the appellant when the purchase price is received.

We, therefore, find that the LJ had erred in dismissing the appellant's claim for negligence against the respondents as solicitors. No vendor's interest would be safe if such a practice by the respondents as solicitors is approved by the court. Such a negligent practice cannot be condoned much less approved by the court.

We therefore find merits in the appeal and allow the appeal and set aside the order of the High Court except for the judgment in default ('JID') entered against R1 which is affirmed and varied as follows.

We allow Judgment for the sum of RM1,447,272 to be entered against all the respondents/defendants jointly and severally as prayed together with special damages as granted by the High Court and with interest as prayed for until the date of realisation.

With respect to R1/D1 only we affirm the decision of the High Court on assessment of general and aggravated damages and these heads of damages are to be assessed by the High Court.

The other prayers/reliefs claimed by the appellant/plaintiff are hereby dismissed as against R2 to R6.

We order costs of RM30,000 to the appellant against each set of solicitors from R2-R6, here and below subject to allocator.